Supreme Court, U.S.
FILED
(1)
941917 MAY 16 1995
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1994

ANANIAS GUMBUS, JR., et al.,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL
WORKERS INTERNATIONAL UNION,
AFL CIO/CLC; LOCAL UNION 242 UNITED
FOOD AND COMMERCIAL WORKERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Asa H. Hoke
Attorney for the
Petitioners
Suite 6
Century Plaza Building
5830 Mt. Moriah
Memphis, Tennessee 38119
(901) 795-4600

QUESTIONS PRESENTED FOR REVIEW

1. Whether the statute of limitations on a claim against a Union is tolled during the pendency of the Union's active representation of the Plaintiffs, in the District Court, for breach of the collective bargaining agreement which underlying claim gives rise to the breach of the duty of fair representation claim before this Court?

2. Whether the due diligence requirement is applicable when related litigation is pending?

3. Should due diligence be required, under equitable tolling, when the Defendant has undertaken to actively conceal, by affirmative acts, Plaintiff's cause of action?

LIST OF PARTIES

The petitioners are:

1. Ananias Gumbus, Jr.,
2. Frank Adams, Jr.,
3. Joseph W. Alsandor,
4. Clayton Andrews,
5. Earnest Lee Armour,
6. Ellis Baker,
7. Charles W. Banks,
8. David Bernard Banks,
9. Harry Lee Banks,
10. Johnnie Lee Bass,
11. Dock E. Bates,
12. Raymond Beckley,
13. Andrew Boller, Jr.,
14. Felix Booker,
15. Robert Bowden, Jr.,
16. Lonnie Bridgeforth, Jr.,
17. Andrew L. Broome,

18. Charles L. Broughton,

19. Linsey J. Brown,

20. Charles E. Brown,

21. Robert L. Brown,

22. Willie F. Brown,

23. Lester Busby,

24. Alvin Lee Butts,

25. Therman Byrd,

26. Earnest T. Calhoun,

27. Shirley Cassini,

28. William L. Carpenter,

29. Levy Cathey,

30. Clinton Clairborne,

31. Andrew B. Cleaves,

32. Calvin Cobb,

33. Leroy Conley,

34. David D. Cornelius,

35. Freddie Crawford,

36. Lombus Crenshaw,

37. Richard C. Crump,

38. Robert L. Cruther,

39. Ledora Curry, Next of kin to John H. Curry, Deceased.,

40. Leon Curry,

41. Charles W. Davis,

42. Roy E. Davidson,

43. James F. Dean,

44. John T. Delk, Sr.,

45. Walter H. Dortch,

46. Larry J. Douglas,

47. Alonzo Travis Dye,

48. Willie Fred Earl,

49. Herman Edwards,

50. Thyree Edwards, Jr.,

51. Dlae B. Evans,

52. Clifton Feathers,

53. Elmer G. Flowers,

54. Claude L. Franklin,

55. Leland Fryer,

56. Sally Lee Gaines, Next of kin to

Richard Gaines, Deceased.,

57. Curtis Garner,

58. Harvey L. Garret,

59. John D. Gentry,

60. Ben O. Gilbert,

61. Ezekiel Glispie,

62. Tyler R. Glover,

63. Willie E. Golden,

64. Jessie Gray, Jr.,

65. David L. Gregory,

66. Carl A. Gurkin,

67. Hubert Hall,

68. O. D. Hall,

69. Robert E. Hall,

70. Will B. Hall,

71. Dan Halley,

72. Anthony Halmon,

73. Damon Hamilton,

74. Billy Hampton,

75. Harry E. Hansel, III,

76. General L. Hardy,

77. Robert M. Harkness,

78. Mary Edna Harkness,

79. James E. Harrel,

80. Bobby G. Harris,

81. Lee E. Harris,

82. Melvin C. Harris,

83. Wylie L. Harris,

84. Bobby Gee Hayes,

85. Richard Hayes,

86. W. C. Hayslett,

87. Bob Hendree,

88. Joe Henderson,

89. Floyd L. Holliday,

90. John H. Holliday,

91. Leroy Holmes,

92. Maurice Horton,

93. Lester Houston,

94. Sharon Howard,

95. Obie R. Howell, Jr.,

96. Essie hubbard,

97. Rita Williamson, Next of Kin to Walter H. Humphrey, Deceased.,

98. Charles L. Hurt,

99. Lue James Irvin,

100. Fredrick D. Isom,

101. Johnny Jack,

102. Wardell Jackson,

103. W. C. Jamerson,

104. Betty Jarret, Next of Kin to Charlies M. Jarret, Deceased.,

105. Cecil Johnson,

106. Eugene Johnson,

107. Michael R. Johnson,

108. Tommie Lee Johnson, Jr.,

109. Edmond E. Jones,

110. George W. Jones,

111. Joe W. jones,

112. R. C. Jones,

113. Lee V. Joyner,

114. Roy Lee Joyner,

115. Harvey Kearney, Jr.,

116. Doris Jean Kerr,

117. Elbert J. Kuykindall,

118. James L. Kuykindall,

119. Joseph L. Kinkle,

120. John E. Leake,

121. Jessie James Lee, Jr.,

122. Ralph D. Leek,

123. Ronald eugene Levy,

124. Donald Lewis,

125. Paul Masen,

126. Walter Mass,

127. Willie Mathews,

128. James E. McClung,

129. William G. McCuin,

130. Eddie B. McKinney,

131. Lester L. McKinney,

132. Roy A. Medlin,

133. Joe H. Merriweather,

134. Edker Lee Mitchell,

135. Gary A Mitchell,

136. James M. Mitchell,

137. John H. Mitchell,

138. James C. Moody,

139. Booke T. Moore,

140. Jerry Murphy,

141. Prentis E. Naylor,

142. Bennie Neal,

143. James Nelson,

144. Dalton Nickleberry,

145. Lillian Nickleberry, Next of Kin to Chester Nickleberry, Deceased.,

146. Mark Nickelberry,

147. James E. O'Bannon,

148. otis Patton,

149. Nathaniel Perry,

150. Paul Pickens,

151. Jerry C. Pinner,

152. Elnora Pointer,

153. James E. Pointer,

154. Andrew Pollard,

155. Lonzo Pollard, III,

156. Charles Powell,

157. Frank A. Quinn,

158. James C. Quinn,

159. Terry L. Ramsey,

160. Verge Rhyan,

161. David W. Richardson,

162. Robert Riley,

163. Milton Douglas Jones, Sr.,
Next of Kin to
Earnest James Robertson, Deceased.

164. Jeffery Lynn Robinson,

165. Elvis calvin Rodgers,

166. Walter H. Rodgers,

167. Johnnie V. Rodriquez,

168. Willie G. Russell,

169. Charles Edward Salter,

170. Willie Salter, Jr.,

171. Oscar Sales,

172. David Shannon,

173. Albert Shipp,

174. Robert Shreve,

175. Warutta Snow, Next of Kin to A. C. Snow, Deceased.,

176. Mark Smith, Jr.,

177. Bobby G. Stricklin,

178. Jamie D. Stricklin,

179. Brad Strikland,

180. Matthew Strong, Jr.,

181. Sammie L. Swanagan, Jr.,

182. John T. Taylor,

183. Robert Taylor,

184. James W. Thomas,

185. Clarence E. Thompson,

186. James A. Thompson,

187. James Unknown Thompson,

188. Jerry Mack Thorton,

189. Paul L. Tittle,

190. Willie L. Tuggle,

191. R. T. Tyler,

192. Clarence Ulmer,

193. Samuel Upchurch,

194. Naomi R. Naomi R. (Wilson) Villes,

195. Morris B. Walker, Jr.,

196. Marry L. Ward,

197. William E. Ward,

198. Joe White,

199. Louis E. White,

200. Richard Whitmore,

201. Harrold H. Williams,

202. Jerry L. Williams,

203. Reuben E. Williams,

204. Robert E. Williams,

205. Herman C. Wilson,

206. Leo Wilson,

207. Lonnie F. Wilson,

208. Wayne Bernard Wilson,

209. Willie Joe Wilson,

210. Charles Windless, Jr.,

211. Neugene Woodward,

212. Paul Woodard,

213. Calvin Woods, Jr.,

214. Bernard Wright,

215. Sidney A. Yates,

216. James M. Yates, Sr.,

217. Arthur Lee Butts,

218. Allen Brown,

219. Billy W. Harris, and

220. James E. Thompson.

The respondents are:

1. United Food and Commercial Workers International Union, AFL-CIO/CLU, and

2. Local Union 242 United Food and Commercial Workers.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES . . . . . .ii - xiii

TABLE OF CONTENTS xiv

TABLE OF AUTHORITIES. xv

OPINIONS BELOW. xvi

STATEMENT OF JURISDICTION xvii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT . . . 6

CONCLUSION. 37

APPENDIX

OPINION OF DISTRICT COURT. . . A

OPINION OF SIXTH CIRCUIT . . . B

ORDER DENYING MOTION TO REHEAR C

TABLE OF AUTHORITIES

Acri v. International Assoc. of Machinists, 781 F.2d 1393, 1396 (9th Cir. 1986) 8

Arnold v. Air Midwest, 1994 WL 247442, *8 (D. Kan) 9

Bertucci v. General Teamsters Union Local No. 174, 867 F.2d 612 (9th Cir. 1989). 5

Burnett v. New York Central R.R., 380 U.S. 424 (1968). 13

Cambell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982) 20, 22

Cummings v. John Morrel & Co., 1994 FED App. 0337P (6th Cir. Sept 23, 1994) 26

Dunleavy v. Local 1617, United Steel Workers, 814 F.2d 1087 (6th Cir. 1987). 12, 13, 15

Honda v. Clark, 386 U.S. 484 (1967) 7

Jones v. General Motors Corp., 939 F.2d 380 (6th Cir. 1991) 27

Walker Mfg. v. Dickerson, Inc., 560 F.2d 1184(4th Circ. 1977). . . . 34

OPINIONS BELOW

The District Court for the Western District of Tennessee filed its unpublished opinion - ORDER GRANTING MOTION TO DISMISS AND DENYING RULE 11 SANCTIONS - on November 30, 1992, is reprinted in Appendix A.

The Sixth Circuit Court of Appeals filed its unpublished opinion on January 6, 1995, and is reprinted in Appendix B.

The Sixth Circuit Court of Appeals filed its unpublished opinion - ORDER DENYING PETITION TO REHEAR- on Febuaury 17, 1995, is reprinted in Appendix C.

STATEMENT OF JURISDICTION

The Order Denying Motion To Rehear by the Sixth Circuit Court of Appeals was entered Febuaury 17, 1995 and this Petition is being filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

In July of 1982, John Morrell & Co. shut down its Memphis plant resulting in nearly 600 workers losing their jobs. In February of 1983, the Unions representing the Morrell workers learned that Morrell had plans to re-open the Memphis plant. In September of 1983, the Memphi s Packing Company is opened and the former Morrell employees were not hired back pursuant to the collective bargaining agreement. In January of 1984, 138 of the 600 laid off Memphis workers filed a private cause of action against both the company and the Unions, Cummings (hereinafter Cummings' (1)). However, the remaining 450 plus workers chose to stay with Union representation, who promised to protect the workers'

interest and get the workers "more money" if the workers did not join Cummings (1).

In 1987, the Unions filed claims and cross-claims (Cummings v. Morrell) on the Petitioners' behalf, in both the pending District Court case and before the NLRB, against Morrell for their breach of the collective bargaining agreement in 1983-84. In Cummings, the Unions asserted that the state statute of limitations for contracts was applicable. (A legal position the Unions claim in "good faith" to be correct until ruled upon in 1991 and 92 by both the NLRB and the District Court to be legally invalid). However, on August 27, 1991, the NLRB dismissed the Unions claims, filed on behalf of the Petitioners', holding that the state contract statute of limitations was not

applicable and the Unions' suit was therefore, untimely. Within 6 months of the NLRB decision, which was the ***first*** public decision placing the Petitioners' on notice that the Unions may have failed to adequately represent their interests by filing a timely suit, the Appellants sought independent representation and filed suit (Gumbus et. al.) against the Unions for breaching their duty of fair representation.[1]

---

[1] In the interim, in 1989, the Cummings' (1) plaintiffs settled with Morrell and shortly thereafter, in December of 1989, the Unions settled with the Cummings' (1) Plaintiffs. However, the 1989 settlement of Cummings (1) was a non-disclosed, no admission of guilt settlement agreement including a liquidated damages clause for breach of the settlement's confidentiality by any of the Cummings' (1) Plaintiffs. **(It is important to note,** however, that the Unions continued to pursue the claims on behalf of the Petitioners in this case (Gumbus et al.) against Morrel.)

In the District Court, Petitioners' argued that their statute of limitations should be tolled under an equitable tolling theory. In support of their contention, the Petitioners submitted affidavits showing that they were informed by the Unions and their representatives, from 1984 to 1991, the following:

1. Statement in Union meetings: "don't join the other claim, we will get more money for you;"

2. Personal conversations: "don't waste your money" by getting another attorney, the Union is handling your claim and "we will protect your interests;"

3. Response to letters and personal inquiries: "you will get your

money;" and

4. Statements to Memphis Packing Employees: "We got you covered."

See (Affidavits, Appendix D1-D10) Furthermore, as evident in the pleadings and affidavits, the Appellants were in constant contact with the NLRB and Sheryl Sternberg monitoring the status of their NLRB complaints filed by the Unions on their behalf.

However, on November 30, 1992, the District Court dismissed Petitioners' Gumbus et al. action as untimely. The 6th Circuit upheld the District Court's dismissal finding that the Petitioners should have known, after 1989, that their interest were not adequately being represented by the Unions. The 6th Circuit reasoned that the 1989 decision

in Aquinaga and the 1989 settlement of Cummings (1) (collateral cases involving completely different set of claimants) should have effectively aroused the Petitioners' suspicions of the Unions' breach of their duty of fair representation. Furthermore, the Court asserted that because of that arousal of suspicion, the Appellants' actions in relying upon Union assertions that in 1988 their claims were being pursued failed to meet the requirement of due diligence under an equitable tolling theory.

On February 17, 1995 the Sixth Circuit denied Petitioners' motion to rehear.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit ruled that the Petitioners' statute of limitations for breach of the duty of fair representation was not tolled during the pendency of the Unions' underlying claim, Cummings v. Morrell in the District Court, for breach of the collective bargaining agreement against the employer (John Morrell & Co.). This holding is dangerous precedent for Unions can now avoid liability for breach of their duty of fair representation by merely opting out of private resolution (permitting tolling) and filing suit in the District Court (prohibiting tolling). Although this Court has held that the statute of limitations is not tolled during the pendency of a collateral NLRB action,

this Court has not addressed whether tolling is permitted during the pendency of an underlying claim of related litigation in the District Court. However, in Honda v. Clark, 386 U.S. 484 (1967), this Court has held that statutes of limitations may be tolled during the pendency of related litigation.

In the case now before this Court, the Sixth Circuit held that Petitioners' statute of limitations began to accrue in 1988.[2] However, the breach of the duty of fair representation did not accrue until Petitioners' damages became irreparable and the Petitioners' damages did not become irreparable until both the

---

[2] In 1987, the Unions had asserted claims, before the NLRB and the District Court, on Petitioners' behalf against Morrell for breach of the collective bargaining agreement. Furthermore, both claims were unresolved as of 1988.

NLRB's and the District Court's dismissal of the Unions' claims. In Acri v. International Assoc. Of Machinists, 781 F.2d 1393, 1396 (9th Cir. 1986), the Court held that "a cause of action does not accrue at the time plaintiff becomes aware of the wrong if, at that time, the plaintiff's damages are not certain to occur or too speculative to be proven." In 1988, the Petitioners' damages were not certain to occur for had the Unions been successful in their assertion of the Petitioners' cross-claims in Cummings v. Morrell (related litigation), the instant case would have been *moot*.

In Arnold v. Air Midwest, 1994 WL 247442, *8 (D. Kan), the Court held that a duty of fair representation cause of action awaits the exhaustion of grievance

process only if the "union represents an employee, throughout [the] grievance procedure" and the outcome of that process might cure or moot the duty of fair representation claim. Similarly, the filing an of action in the District Court has the same implications as that of internal grievance procedures in tolling the statute of limitations. Though the filing of NLRB actions do not toll the statute of limitations for § 301 actions, the NLRB action is not a parallel avenue or an underlying suit. NLRB actions are optional and, therefore, distinguishable from the instant case.

In the case now before this Court, the Union was contractually bound to represent the interest of the Petitioners'. By tolling the statute of

limitations for the DFR action while the Union has the underlying unfair labor practice action filed on the Petitioners' behalf in the District Court, the Court will be providing the Union an opportunity to fulfill their contractual obligations by representing the aggrieved Union members' interests. This situation is analogous to the policies of tolling the statute of limitations articulated in Dunleavy v. Local 1617, United Steel Workers, 814 F.2d 1087 (6th Cir. 1987). In Dunleavy, as in the case now before this Court, the 6th Circuit stated that:

> The Union's position would seem to require one placed in Dunleavy's situation to file a lawsuit which would become superfluous in the event of favorable Convention action simply as a matter of protection. In addition to other practical objections to such filings, we feel

> constrained to point out that we would be loath to require further cluttering up the docket of the overburdened federal judicial system for such a contingent purpose.

Id. At 1091.

However, the Sixth Circuit's ruling, in the case now before this Court, would have the Petitioners' file their suit in 1988 (against the Unions) while the Unions were pursuing the Cummings v. Morrell cross-claims, on Petitioners' behalf, in both the District Court and before the NLRB. Such a contingent filing would be the premature cluttering up of the federal docket of which Dunleavy warned. Furthermore, if Petitioners' had filed the Gumbus et al. action in 1988, their damages for the Unions' breach of duty of fair representation would have been

contingent, in 1988, pending resolution of the Unions cross-claims. Therefore, according to the 6th Circuit's reasoning in Dunleavy, a 1988 filing, of Gumbus et al. would have been termed premature and contingent clutter of the Federal Court's docket. However, according to the Sixth Circuit's holding in the instant case, the Petitioners' should have filed their action in 1988 even though their damages were not certain to occur and were contingent upon resolution of a pending underlying case.

Permitting tolling of the statute of limitations during the pendency of the Unions' underlying cross-claims on Petitioners' behalf is consistent with the general purposes of the statute of limitations. In Burnett v. New York

Central R.R., 380 U.S. 424 (1968), the Supreme Court explained that statute of limitations "promote justice by preventing surprise through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." The Unions have been involved in litigation over these matters as either Defendants or Plaintiffs (as in Cummings v. Morrell) since 1984. Furthermore, the Unions have been involved in litigation of these claims up to the 1993 Appeal of Aquinaga, including its ultimate denial of Certiorari in 1994, and up to the 1994 dismissal of the Cummings v. Morrel suit encompassing the Appellants' cross-claims. Therefore, the Union can hardly claim that it lacked

notice as to the nature of Petitioners' claim or that the relevant evidence is no longer extant.

The policy behind the six month statute of limitations for § 301 claims is the expeditious resolution of labor disputes. However, the 6th Circuit in Robinson balanced this objective with the policy of promoting private resolution of disputes while ensuring a judicial forum to resolve disputes. If the Unions' underlying cross-claims do not operate to toll the Petitioners' statute of limitations for their DFR claim, the policy articulated in Robinson will be undermined as exemplified by the following hypothetical:

Union realizes that it has made a fatal mistake in the representation of

its workers against the employer for breach of a collective bargaining agreement. The Union realizes that their error or omission will be disclosed to its workers if the matter is handled through internal grievance procedures and/or appeals. Furthermore, the Union knows that once the workers it represents discovers the errors, the workers can file a timely suit for breach of the duty of fair representation because internal procedures toll the statute of limitations.

Therefore, knowing that these internal procedures would toll the statute of limitations, the Union files suit in the Federal Court with claims on the workers' behalf hoping that by the time their errors are brought to the

attention of the Court and its workers,' the six month statute of limitations will have passed. The Union is correct. The errors are not brought out until 7 months after the filing of the Federal lawsuit. If the statute of limitations is not tolled during the pendency of the Union's underlying suit on their workers behalf, the workers have now lost their ability to file a timely breach of the duty of fair representation lawsuit merely because the Unions opted for resolution in the District Court (a factor beyond the trusting workers' control).

Therefore, the Union clearly has an incentive to file suit in the Court knowing that when the truth is discovered, the workers will have to successfully argue equitable estoppel or

remain complete remediless. Given the Sixth Circuit's reticence in applying this doctrine, it is clearly to the Union's advantage to forego internal proceedings which toll the statute of limitations and file in the Federal Courts.

Such manipulation should not be countenanced by this Court and, therefore, this Court is respectfully requested to hold that the Petitioners' actions were tolled during the pendency of the Unions' underlying claims. This avoids the needless filing of contingent cases of which Dunleavy warns while affording Unions the opportunity to represent their workers without a contingent claim hanging over their heads. To hold otherwise would:

1. Place the workers in the ambivalent situation of suing those who claim to be representing them in good faith,

2. Give Unions incentive to opt out of internal procedures which toll the workers' statute of limitations and is contrary to the policy of promoting private resolution of labor disputes,

3. Give Unions incentive to file suit in the District Court to prevent workers' claims from tolling,

4. Give Unions incentive to file suit in District Court thereby forcing workers to meet the burdens of due diligence and equitable estoppel if and when the suit fails. (Note, these issues would not arise if internal procedures were followed and a decision contrary to the Union, evidencing Unions' breach of DFR,

was rendered internally).

DUE DILIGENCE

This Court, it is submitted should resolve the substantial conflict among the Circuit Courts as to whether the due diligence standard applies where a defendant has engaged in affirmative acts of concealment beyond the original fraud itself. Those Circuits[3] applying the rule of due diligence have rationalized that the rule "will work no injustice in cases of active concealment . . . [because a]ctive concealment by the defendant will be considered in determining the reasonableness of the behavior of the plaintiff under the

---

[3] 6th Circuit, 10th Circuit, and 5th Circuit.

circumstances." Cambell v. Upjohn Co., 676 F.2d 1122 (1982). In contrast, the Second, Seventh, and D.C. Circuits have held that where the defendant has engaged in active concealments or frauds, the statute of limitations is tolled until actually discovery by the plaintiff.[4]

The Sixth Circuit's steps to eliminate the potential harshness of requiring due diligence in cases of active concealment (by taking into consideration the acts of concealment when determining whether due diligence has been satisfied) have failed in the case now before this Court. It is illogical to reward parties committing

---

[4] Tomera v. Galt, 511 F.2d 504 (7th Cir. 1975); Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986); Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (2nd Cir. 1975).

ongoing and calculated fraudulent acts by placing, on those injured by the fraudulent acts, the burden of showing due diligence. Furthermore, the instant case exemplifies the potential injustice arising under a rule requiring due diligence in cases of active concealments. Therefore, the failure of this Court to resolve this conflict will continue to produce extensive forum shopping, chaos, and uncertainty which is precisely what a Statute of Limitations is designed to correct in an area of law that cries out for uniformity and fairness.

In the case now before this Court, the Sixth Circuit cited Cambell v. Upjohn Co., 676 F.2d 1122 (6th Cir. 1982), for the proposition that relying on the

assurances from a union or company official is not sufficient to meet the burden of diligence. In Cambell, the Plaintiff merely relied on the oral assurances of company officials and shareholders that a payment to him was forthcoming. Furthermore, in Cambell, the Sixth Circuit questioned whether mere oral assurances can amount to an active concealment.

However, in 1988 (the date that the Court ruled that a reasonably diligent Plaintiff would have discovered the basis for the breach), the Petitioners were no longer relying on "empty promises" or mere assurances that the Unions were representing their interests. **In 1988, the Petitioners were, in addition to the oral assurances and representations, were**

relying on the fact that the Unions had currently pending, in both the District Court and before the National Labor Relations Board, cross-claims on the Petitioners' behalf.

Therefore, according to the Sixth Circuit's ruling, the Petitioners' diligence should have exceeded the determination that suit was currently pending on their behalf. This is an unreasonable and insurmountable burden. Is this Sixth Circuit requiring that the Petitioners be clairvoyants and determine before either the District Court or the NLRB had rendered a decision that the Unions' 1987 cross-claims, on Petitioners behalf, would be unsuccessful. This point is raised only because had the Morrel v. Cummings' cross claims, on the

Petitioners' behalf, been successful (in arguing for the longer contract statute of limitations), the Petitioners' claims in the instant case would have been *mooted*.

However, once the NLRB ruled that the Cumming's claims were untimely on August 27, 1991, the *first* public opinion indicating that the Unions claims on the Petitioners' behalf would likely fail, the Appellants exercised enough diligence to obtain independent counsel and have suit filed within six months of that ruling. Furthermore, it is important to note that the Petitioners did not wait on potential futile Appeals. Once they were apprised that the Morrel v. Cummings' suits were untimely they immediately sought independent representation and

brought this action.

Assuming arguendo, that the Sixth Circuit had ruled that the Petitioners' suspicions should have been excited by the fact that the Unions failed to take action on their behalf until 1987. Then the Court would have effectively held the Petitioners to higher standard than that of the Unions' sophisticated attorneys. In dismissing the Petitioners' underlying cross-claims or related litigation in Cummings v. John Morrel & Co., 1994 FED App. 0337P (6th Cir. Sept 23, 1994), where the Unions' asserted that the state statute of limitations for contract should apply, the Sixth Circuit noted that:

> Finally, the "practicalities of litigation" do not favor the use of a longer state limitations period here. In

> DelCostello the Supreme Court warned about the dangers of requiring unsophisticated workers to gather information about an event and file a lawsuit within a narrow time frame. 462 U.S. at 165-66. Here however, we are presented with a sophisticated claimant that is an experienced litigator. It works no unfairness against such a party to impose a six-month time limit on the bringing of a claim such as this one.

Id. at *17.

Assuming, the Unions' suit was filed in good faith and the Unions sincerely believed that the longer contract statute of limitations would apply, is the Sixth Circuit now holding that in 1988, the unsophisticated and uneducated Appellants' knew or should have known that the longer statue of limitations would not apply. This holding would also require that uneducated Plaintiff's

should second guess the work and expertise of their attorneys, in cases similar to the instant, and file a simultaneous contingent suit against their own attorneys while the attorneys' are currently pursuing an underlying cause of action on their behalf.

Furthermore, the Sixth Circuit cited Jones v. General Motors Corp., 939 F.2d 380, 385 (6th Cir. 1991), to buttress the proposition that relying on assurances from a union or company official is not sufficient to meet the burden of the due diligence test. However, Jones merely stands for the proposition that ignorance of the legal process due to complexities of the state and federal legal systems, alone, will not provide a basis for an equitable tolling. Id. at 385. See also

Id. (stating he thought he had to wait for right to sue letter from EEOC, before could pursue claim and thought he was to file within 90 days from that time)

Unlike Jones, the Appellants have not asserted that they failed "to file suit within the statue of limitations because of their ignorance of the 'complex state/federal legal systems.'" Id. Here, the Petitioners are alleging that the Unions' actions (Unions filing suit on their behalf) and statements (Unions' assertions that their interest were being represented so "don't go out and join the other lawsuit") induced Petitioners to forego the right to sue. Interestingly, Jones clearly states that "[t]o successfully raise a claim of equitable tolling, a party must either

show a fraudulent concealment of the critical facts that would lead one to know that he can sue, or a misrepresentation of those facts -- whether made in good faith or not -- that was calculated to induce a plaintiff to forego the right to sue." Id.

Furthermore, in Cambell, the Sixth Circuit stated in *dicta* that concealment in equitable tolling cases contemplates acts preventing a Plaintiff from discovering his cause of action. In the instant case, had the Cummings v. Morrell suit not been filed when the Aquinaga jury decisions were published in 1989, then the Petitioners' would have known that the breach had occurred. However, since Cummings v. Morrell was filed on the Petitioners' behalf when the Aguinaga

decision was rendered, it was impossible for the Petitioners' to ascertain whether or not the breach had occurred until a ruling was made on their own cross-claims in the Cummings v. Morrell suit. Therefore, the net effect of the Cummings v. Morrell cross-claims was further active concealment of affirmative facts evidencing the Unions' breach of the duty of fair representation. Until a decision in Cummings v. Morrel, further inquiries made by the Petitioners' into the legitimacy of the Unions' cross-claims would have been both futile and bothersome to the Court (as the Appellants' learned from their constant contact with Sheryl Sternberg and the NLRB).

Furthermore, the Unions' assertion

that the breach of the duty of fair representation occurred prior to the ultimate dismissal of the Cummings v. Morrel suit on August 25, 1994, infers that not only was the Cummings suit frivolous but that Petitioners knew or should have known that the Unions' efforts to represent them in Cummings were futile. However, it was not until the NLRB ruled contrary to the Unions assertions, on August 27, 1991, that Appellant were aware or had actual knowledge that the Unions might have failed to adequately represent their interests. Therefore, the Petitioners were not apprised of sufficient information to place them on notice that the Union had breached its duty of fair representation until after the NLRB

ruling.

Application of the rule requiring due diligence, as applied by the Sixth Circuit in the instant case, produces an unworkable and unjust standard. In the case now before this Court, it was impossible for the Petitioners in 1988 to have meet the due diligence requirement as applied by the Sixth Circuit. In 1988 the Unions' had pending on behalf of the Petitioners' a cause of action before the District Court and the NLRB. **At that point, Petitioners' could only wait to see whether or not these actions would adequately represent their interests and no conceivable level of due diligence could expedite that determination.**

In contrast, those Circuits tolling the limitations period until actual

discovery, in cases of active fraudulent concealment, would hold that the statute of limitations began to accrue upon the Petitioners' actual discovery (the NLRB's ruling, i.e., first public ruling) that the Unions cross-claims in Cummings v. Morrel were untimely. Therefore, tolling until actual discovery in cases of active concealments produces a more just and workable standard and does not reward Unions for their calculated and deceptive practices.

Furthermore, elimination of the due diligence requirement is consistent with doctrine equitable estoppel. In Walker M.G.. Co. v. Dickerson, Inc., 560 F.2d 1184, 1187 (4th Cir. 1977), the Fourth Circuit held that "if the doctrine of equitable estoppel is applicable, the

statute of limitations would not begin to run until the acts or representation, causing plaintiff's delay, had ceased." In the case now before this Court the Unions argued:

> [i]n support of its Rule 11 motion, . . . that Mr. Hoke, as counsel to the Cummings plaintiffs and one familar with the relevant labor laws, was uniquely position to know that the Gumbus claims were fatally flawed when he filed them and also knew that the Unions were already actively pursuing claims on behalf of Gumbus and other former Memphis employees.[5]

---

[5] This is the Unions' red herring to this litigation. the Unions claimed that Asa H. Hoke knew or should have known that the Gumbus action was stale. However, this contention is misplaced. What Mr. Hoke knew or should have known is of no legal consequence. The legal standard is clearly what the Petitioners' knew or should have known and not what their attorney knew as the result of a prior non-disclosed confidential settlement providing for liquidated damages for breach of the settlements confidentiality (keeping the 1989

Therefore, the precise active concealment causing Petitioners' delay, the Unions' assertions of representation, did not cease until the Sixth Circuit's Ruling on September 29, 1994. Accordingly, the Gumbus et. al. action (quite possibly prematurely filed) should have been tolled pending resolution of Cummings v. Morrell for had the Unions been successful in the Cummings case, the Gumbus et al. claim would have been moot.

The Sixth Circuit's application of

---

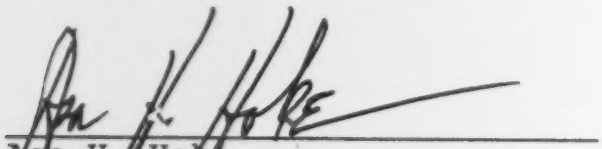
settlement confidential was a further active concealment by the Union). the law, therefore, mandates that a factual determination be made as to what the Gumbus et. al. employees knew or should have known in determining the timeliness of their claim against the Unions for the Unions' breach of the duty of fair representation. Tom impute an attorney's knowledge on the Petitioners would undermine the current legal standard.

the due diligence standard in the case now before this Court is dangerous precedent. It rewards Unions' for calculated and deceptive practices adversely impacting Union members who are particularly vulnerable to the Union. Union members vote for the Unions because they believe in the Unions and feel as if the Unions will always represent their interests. Judicial notice must be taken of the message this decision is sending: The countenancing of calculated deceptive practices and all but sanctioning those who complain of the harm occasioned by those deceptive practices while rewarding the Unions with freedom from liability to those damaged by its actions.

CONCLUSION

For these reasons, the Court should grant this Petition for Certiorari and, upon review, the judgment of the Sixth Circuit Court of Appeals should be reversed in relevant part.

Respectfully submitted,



Asa H. Hoke
Attorney for petitioner
Suite 6
Century Plaza Building
5830 mt. Moriah
Memphis, Tennessee 38119
(901) 795-4600

FILED NOVEMBER 30, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ANANIAS GUMBUS, JR., ET AL.,

Plaintiffs,

v. No. 92-2177-4a

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO/CLC, and LOCAL UNION 242 UNITED FOOD AND COMMERCIAL WORKERS,

Defendants.

ORDER GRANTING MOTION TO DISMISS AND DENYING RULE 11 SANCTIONS

Before the Court is a Motion To Dismiss An For Rule 11 Sanctions filed by defendants United Food and Commercial Workers International Union and Local Union 242 ("Union" hereinafter). The motion seeks dismissal under Rules 12(b)(1) and 12(b)(6), and moves for Rule

11 sanctions against plaintiffs' attorney for filing the suit. Plaintiffs, who were Union members, bring claims for breach of the duty of fair representation.

Background

Plaintiffs are 220 Union members and former employees of John Morrell & Co. (Morrell"). Plaintiffs worked in Morrell's meatpacking plant in Memphis, Tennessee. In June and July of 1982, Morrell closed its meat-packing plants in Ark City, Kansas and Memphis. In March and September of 1983, Morrell reopened the two plants.

In January, 1984, a group of workers in the Memphis plant filed a § 301 suit under the Labor Management Relations Act against Morrell and the Union in this District. In that case, styled Cummings, et al. v. John Morrell & Co., et al.,

No. 84-2062-HA ("Cummings") the workers alleged, inter alia, that the Union had colluded with Morrell, through secret arrangements to modify bargaining agreement, to deny the worker's of their vested rights upon the reopening of the Memphis plant. The attorney for the Cummings plaintiffs, Asa H. Hoke now represents the plaintiffs in the instant case. The employees at the Memphis plant were divided over whether to join the Cummings lawsuit. Some 138 Memphis workers joined Cummings, but the majority did not.

Earlier, in September, 1983, workers at the Ark City plan filed a § 301 suit in the District of Kansas against the Union and Morrell, Aguinaga, et al v. John Morel & Co., et al., No 83-58-T ("Aguinaga"). Aguinaga asserted nearly identical claims as those in Cummings,

but with respect to the closing and reopening of the Ark City plant.

On January 30, 1987, the Union filed a cross-claim against Morrell in Cummings, alleging bad faith breach of the bargaining agreement. The cross-claim sought lost wages and benefits for all employees who lost rights after the reopening of the Memphis plant, which included the plaintiffs in the instant case. On October 23, 1987, the Union filed an unfair labor practice ("ULP") charge against Morrell on behalf of the membership with Region 13 of the National Labor Relations Board ("NLRB"). On August 27, 1992, the NLRB dismissed the charge on limitations grounds.

The Cummings plaintiffs settled with Morrell and the Union in Cummings in 1988 and 1989. Part of the Union's cross-claim, however, is still alive in

Cummings.

The instant Complaint was filed on February 24, 1992. Plaintiffs herein were among those who did not join the Cummings plaintiffs in their 1984 suit. The present plaintiffs allege the same claims of collusion and concealment against the Union as asserted by their co-workers in the Cummings suit. In addition, plaintiffs allege facts occurring after Cummings was filed which plaintiffs claim constituted a cover-up by the Union and a successful attempt by Union officials to fraudulently dissuade plaintiffs from joining the Cummings suit. Plaintiffs sue for breach of the duty of fair representation.

The Union's motion contends that most of plaintiff's claims are barred by the statute of limitations and that some fail to stage a claim upon which relief

may be granted.

Discussion

The statute of limitations for claims of breach of the duty of fair representation is six months. Del Costello v. International Bd. of Teamsters, 462 U.S. 151, 155 (1983). A duty of fair representation claim accrues, and the six-month period begins to run, "when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged violation." Adkins v. International Union of Elec.., Radio and Mach. Workers, AFL-CIO, 769 F.2d 330, 335 (6th Cir. 1985).

When the complaint shows on its face that it has not been instituted within the statutory period, and it is apparent that there is no genuine factual

controversy as to the availability of the defense of limitations, this issue may be resolved on a motion to dismiss. Rohner v Union Pac. R. Co., 225 F.2d 272, 274 (10th Cir. 1955); See, Berry v. Chrysler Corp., 150 F.2d 1002, 1003 (6th Cir. 1954).

The Complaint alleges several wrongful acts by the Union under the rubric of a breach of the duty of fair representation. The Court will consider each alleged wrongful act in turn.

Conspiracy and Concealment

Plaintiffs contend that the Union entered into certain secret "side letter" agreements with Morrell on September 9 and 10, 1982. It is alleged that the agreements furthered a conspiracy between the Union and Morrell to modify the

bargaining agreements unbeknownst to the membership while the Ark City and Memphis plants were closed, then reopen the plants under such modifications which permitted Morrell to pay lower wages and to refuse to recall former employees. Complaint, 5-8. Plaintiffs further allege that the Union actively concealed the conspiracy.

The Court finds that the conspiracy and concealment thereof were discoverable by plaintiffs when the Aguinaga and Cummings cases commenced. The Complaint herein admits that Aguinaga and Cummings alleged the same conspiracy and concealment up to that time as alleged in the instant Complaint, 9. Aguinaga was filed in the District of Kansas on September 23, 1983. Cummings was filed in this District on January 25, 1984. Thus, as of January 25, 1984, at the

latest, the plaintiffs knew, or I the exercise of reasonable diligence should have known, of the conspiracy and concealment which they alleged in the present case.[1] The six-months statute of limitations on the conspiracy and concealment claims thus began to run at the latest on January 25, 1984. The statute had long since run on those claims upon the filing of the instant Complaint on February 24, 1992.

Equitable Tolling

Plaintiffs contend, however, that Union fraud prevented plaintiffs from

---

[1]If the filing of Cummings did not put plaintiffs on notice of their claims, the jury verdict in the Aguinaga case in June, 1988, certainly did. In Aguinaga, described in the Complaint as "almost identical" to the present case, the jury found the Union liable for misconduct with regard to the closing and reopening of the Ark City plant. Complaint, 14.

timely filing suit or bringing charges to the NLRB. In this regard, plaintiffs allege that, before and after the plant closing, they were assured by the Union that it was protecting their legal rights, when in fact it was not, in order to dissuade plaintiffs from joining the Cummings action. Complaint, pp. 9-10. The Complaint alleges that the Union told plaintiffs that appropriate legal processes had been filed, and that it would be a waste of their money to join the Cummings case because the Union was pursuing legal claims on their behalf. Id. The Court takes these allegations as true for purposes of this motion.

Fraudulent concealment of facts which would have served as the basis of a fair representation claim may equitably toll the statute of limitations on the claim. Shapiro v. Cook United, Inc., 762

F.2d 49, 51 (6th Cir. 1985). Despite fraudulent concealment, however, a plaintiff must still show that he failed to discover facts that serve as the basis of his cause of action despite due diligence on his part to discover the facts. Id. at 51. "Any fact that should excite [a plaintiff's] suspicion [about his claim] is the same as actual knowledge of his entire claim.'" Chrysler Worker's Assn.. v. Chrysler Corp., 663 F. Supp. 1134, 1152 (N.D. Ohio 1986), aff'd, 834 F.2d 573 (6th Cir. 1987), cert. denied, 486 U.S. 1033 (1988)(quoting Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)). Moreover, the Sixth Circuit made it abundantly clear in Campbell v. Upjohn Co., 676 F.2d 1122, 1127 (6th Cir. 1982), that "additional acts of

concealment...beyond the original fraud do not exempt the plaintiff from the requirement of diligence..." Campbell at 1128.

Plaintiffs have not satisfied the requirement of due diligence to support equitable tolling First, there is no cogent explanation as to why one group of Morrell workers -- plaintiffs herein -- are alleged to have been fraudulently influenced against suing the Union, while fellow workers in the same plant -- the Cummings plaintiffs -- were able to timely sue on almost identical grounds a full eight years earlier. Second, as plaintiff's own Complaint recites, the Union's initial defense in Cummings was that it owed no duty of representation to the former Memphis employees. Complaint,

10. This position of the Union, which was contrary to what the Union was telling plaintiffs, was part of the public record in Cummings. Id.; Plaintiffs' Memorandum, 9. Plaintiffs certainly were aware of their co-workers' case in Cummings. Due diligence required that they keep abreast of that case, which, after all, involved issues profoundly affecting their own situation. Third, and significantly, the Union eventually did file a cross-claim against Morrell in Cummings in 1987 and a ULP charge with the NLRB against Morrell on October 23, 1987. Complaint, 10-11. Clearly, these filings should have aroused plaintiffs' suspicions that the Union had not previously been taking legal action as represented. Thus, even

if the limitations period were tolled up until the filings in 1987, the period ran out 6 months after the 1987 filings.

In sum, lack of the requisite due diligence is affirmatively shown on the face of the Complaint. Plaintiffs cannot expect to file claims, some eight years old, when they delay is attributable to their own failure to diligently protect their rights. Neither can the allegations of Union misrepresentations be turned into a separate fair representation claim when lack of due diligence in discovering such misrepresentation prevented the timely bringing of such a claim. Thus, the limitations period on the conspiracy and concealment claims will not be tolled.

Failure to File Unfair Labor Practices

Charge

The Union in this case ultimately filed an unfair labor practice charge against Morrell in October of 1987, which was dismissed on limitations grounds. Plaintiffs' claim is that the Union refused or delayed bringing a timely ULP charge to further conceal its own involvement in the conspiracy regarding the closing and reopening of the plants. However, this alleged bad faith delay was knowable to the plaintiffs, in the exercise of due diligence, long before commencement of the present suit. Again, the actual filing of the ULP charge in October of 1987, at the latest, clearly signaled that no such charges had been filed before, and thus, that the Union had been misrepresenting its pursuit of actions on behalf of the Memphis

membership. Plaintiffs were already charged with notice at that time of the alleged conspiracy between the Union and Morrell by virtue of the Aguinaga and Cummings lawsuits filed several years before. Thus, the limitations period on the present claim that the Union wrongfully and untimely delayed bringing the ULP charge began to run in October 1987, at the latest, and terminated in April, 1988, four years before the instant suit.

Failure to File Cross-Claim in Cummings

Plaintiffs also charge the Union with having delayed the filing of a cross claim against Morrell in the Cummings action.[2] When the breach of duty alleged

---

[2]The claim must be that the Union delayed filing, not failed to file, because in 1987 the Union changed its position and filed a cross-claim. Complaint, 11. Although Count II of

is a union's failure to take remedial action, the limitations period begins to run when it was apparent or should have been apparent that the union would take no such action. See McCreedy v. Local Union No. 971, UAW, 809 F.2d 1232, 1236 (6th Cir. 1987).

The timeliness of this claim is undermined by allegations present in the Complaint. The Complaint alleges that plaintiffs' present counsel, Asa Hoke, in his capacity as counsel for the Cummings plaintiffs, "beseeched" the Union "as early as May 23, 1984" to file cross-claims on behalf of Union members against Morrell in the Cummings lawsuit. Complaint, 10. Furthermore, as

---

the cross-claim has been dismissed, other claims therein are still alive. Thus, even with dismissal of the present case, plaintiffs still have an opportunity to recover for wrongful conduct of Morrell regarding the plant closing.

plaintiffs themselves acknowledge, in May of 1984 the public record in Cummings reflected that the Union's position at that time was that it owed no duty of representation to plaintiffs. Complaint, 10.

It should have been apparent to plaintiffs in 1984 that at that time the Union did not intend to file a claim against Morrell. Thus, the limitations period began to run as of May, 1984 at the earliest. At the latest, the cause of action accrued when the cross-claim was filed in 1987, for then the alleged untimely delay in filing since the commencement of Cummings was clearly apparent. Under either theory, the limitations period has run. Again, for reasons already given herein, the Court finds no basis for equitable tolling in plaintiffs' contentions that the Union

misrepresented its efforts to take legal action against Morrell.

Legal Counsel Claim

The legal counsel claim is a variation on the claim of concealment and misrepresentations by the Union beginning in 1982. Plaintiffs claim that they were denied the right to obtain legal counsel because of such concealment. There are no allegations of discipline or retaliation by the Union to thwart legal action. As discussed above, the claims of concealment based upon the Union misrepresentations are time-barred. By extension, the legal counsel claim of a breach of fair representation is also time-barred.

To the extent that plaintiffs may also be alleging a breach of that section

of the labor bill of rights, 29 U.S.C. § 412, which prohibits labor organizations from limiting the right of union members to sue, the result does not differ. A one-year statute of limitations applies, borrowed from Tennessee's statute of limitations for personal injury tort claims. Reed v. United Transp.. Union, 488 U.S. 319 (1989); Allgood v. Elyria United Methodist Home, 904 F.2d 373, 377 (6th Cir. 1990), appeal dismissed, in part, 913 F.2d 1159 (1990). As discussed, the misrepresentations by the Union would have been exposed by the filing of the 1987 ULP charges and cross-claims, which should have excited suspicion that representations by the Union of previous pursuit of plaintiffs' claims were misleading at best. One year thereafter, the statute ran for any claim under the right to sue provision of the

labor bill of rights.

To summarize the disposition of all the claims and individually discussed thus far, they are time-barred and will be dismissed under Rule 12 (b)(6) for failure to state a claim.

Negligence in Pursuing Litigation

The essence of the final claim is that the Union breached its duty of fair representation by untimely filing the October 23, 1987 ULP charge and Cummings cross-claims in a "neglectful and careless" manner. Further, the Complaint indicates that the cross-claims did not seek sufficient damages on plaintiffs' behalf.

The Union argues that these allegations fail to state a claim upon which relief may be granted under Rule 12

(b)(6). Taking all relevant allegations as true and resolving all inferences in favor of plaintiffs, the Court agrees.

Union officials are not expected to be lawyers. Thus, the Union cannot be held liable for any perceived incompetence or defects in the way the Union's ULP charge or the Cummings cross-claims were handled. Stevens v. Highway, City & Air Freight Drivers, 794 F.2d 376, 377-78 (8th Cir. 1986); Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983).

Plaintiffs have made no allegations from which a legal malpractice claim against Union attorneys (who are not named as co-defendants) can be inferred as either having been stated or even intended.

Union Claim for Rule 11 Sanctions

The Union moves that plaintiffs' attorney, Asa Hoke, be cited under Rule 11 for reasonable expenses and attorneys fees incurred as a result of the filing of this lawsuit. The Union argues that Asa Hoke knew or should have known that plaintiffs' claims were time-barred.

Rule 11 of the Federal Rules of Civil Procedure "imposes a duty on attorneys to certify that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well-grounded in fact, legally tenable, and 'not interposed for any improper purpose.'" Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 110 S. Ct. 2447, 2454 (1990). The test is whether the individual attorney's conduct was "reasonable under the circumstances."

McGhee v. Sanilac County, 934 F.2d 89, 93 (6th Cir.1991)

The Court has given serious consideration to whether Rule 11 sanctions would be appropriate. The memoranda filed indicate a long history of contentiousness in the continuing saga of these disputes. Mr. Hoke has been involved in the litigation between the Memphis employees and the Union for many years. The old claims asserted here presented obvious limitations problems. Due diligence was insufficient.

Nonetheless, Mr. Hoke acknowledges in his response that he anticipated the limitations defense when he filed suit, and the Complaint reflects this. Thus, there was an appeal to equity to toll the statute of limitations. Toward this end, Mr. Hoke presented new allegations showing that the Union misrepresented

facts to deter plaintiffs from suing the Union. Although the argument ultimately fails without any question in this Court's opinion, Mr. Hoke's legal and factual bases for a tolling theory were not so entirely deficient as to reflect incompetence.

The Court thus concludes that Mr. Hoke did not file this suit for an improper purpose, nor was the filing of the suit unreasonable under the circumstances. Thus, Rule 11 sanctions will be denied.

Conclusion

For the foregoing reasons, the Court hereby **GRANTS** the motion to the extent of dismissal and **DENIES** the motion to the extent of Rule 11 sanctions. This case is hereby **DISMISSED**. The Clerk is

directed to enter judgment for defendants United Food and Commercial Workers International Union, AFL-CIO/CLC, and Local Union 242 United Food and Commercial Workers.

IT IS SO ORDERED.

ENTER: This 30th day of November, 1992.

ROBERT M. MCRAE

SENIOR UNITED STATES DISTRICT JUDGE

NOT RECOMMENDED FOR PUBLICATION

Nos. 93-5113/93-5235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED JAN. 6, 1995

ANANIAS GUMBUS, JR., et al.,

Plaintiff-Appellant
Cross-Appellee

v.

UNITED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; LOCAL UNION 242,

Defendants-Appellees
cross-Appellants

PER CURIAM. Claiming the statute of limitations bearing their breach of the duty of fair representation claim should be tolled due to the Union's misconduct, Ananias Gumbus and two hundred nineteen fellow plaintiffs appeal the district court's decision dismissing their claim on a motion under Fed. R. Civ. P.

12(b)(6). the defendants cross-appeal the part of the district court's decision denying their request for Rule 11 sanctions against plaintiffs' attorney, Asa Hoke.

This case arises out of the closing and reopening of a John Morrell & Co. ("Morrell") meat packing plant in Memphis, Tennessee. Morrell closed its plant in July 1982 and reopened it in September 1983. Morrel closed another plant in Arkansas City, Kansas in June 1982 and reopened it in March 1983. After reopening both plants, Morrel paid workers significantly less than before the closings and refused to recall former employees. Two groups of former employees then filed hybrid Section 301 claims against the UFCW, the local unions, and Morrel for breach of the duty of fair representation.

The first group filed suit in September 1983. In Aguinaga, former employees at Morrell's Arkansas City plant asserted claims against the Unions and Morrel stating that the Unions had breached their duty of fair representation by entering into "secret" agreements with Morrel to undermine plaintiff's contractual rights. In 1988, the jury's verdict in that case found that the Unions had breached their duty of fair representation to the Aguinaga plaintiffs.

In January 1984, a group of one hundred thirty-eight former employees from the Memphis plant (none of whom are plaintiffs here) filed suit under Section 301 if the Labor Management Relations Act, 29 U.S.C. § 158, against Morrel and the Unions in a case styled Cummings, et al. v. John Morrel & Co. The Cummings

plaintiffs claimed that the Unions breached their duty of fair representation because they conspired with Morrel to deny the workers their vested rights upon the reopening of the Memphis plant. Asa H. Hoke, the attorney for plaintiffs in the Cummings case, is also the plaintiffs' attorney. In 1988 and 1989, Asa H. Hoke negotiated a settlement involving monetary payments for the Cummings plaintiffs; as a consequence, the unfair representation claim against the Unions was dismissed with prejudice on November 23, 1988. According to eleven affidavits filed by the plaintiffs, at least three plaintiff were aware that a settlement favorable to the plaintiffs was reached in the Cummings case.

In January 1987, the Unions filed a cross-claim in Cummings against Morrel on

behalf of all workers in the Memphis plant, seeking lost wages and benefits due to the reopening of the Memphis plant. The Unions also filed an Unfair Labor Practices complaint against Morrel with the National Labor Relations Board on behalf of all Union members, including the plaintiffs here. On August 27, 1991, the NLRB dismissed the complaint as time-barred.

On February 24, 1992, Hoke filed the instant case on plaintiffs' behalf, alleging the same facts of collusion and concealment as did the Cummings plaintiffs. Based on facts occurring after Cummings, plaintiffs allege a cover-up by the Unions and a successful attempt by Union officials to fraudulently dissuade plaintiffs from joining the Cummings suit. In their complaint and affidavits, plaintiffs

described the actions constituting the basis for their breach of the duty of fair representation claim and how they repeatedly asked union officials about the Unions' actions concerning their rights. The complaint and affidavits also give facts showing the union officials repeatedly assured them that the Unions were pursuing legal action on their behalf. What the complaint and the affidavits do not give are facts showing what steps plaintiffs took to discover the basis for their breach of the duty of fair representation claim.

In dismissing this case, the district court held that plaintiff failed to state a claim for which relief could be granted because they failed to file their claim within six months of the 1982-83 events from which plaintiffs' claim arose. Adkins v. International

Union of Elec., Radio & Mach. Workers, 769 F.2d 330, 335 (6th Cir. 1985). Further, the district court held that the stautte of limitations was not equitably tolled because plaintiffs failed to show, as a matter of law, that they exercised due diligence to discover the basis for their claim. The district also denied the defendants' request for Rule 11 sanctions. For the reasons stated below, we affirm the district court's judgment.

A threshold issue in this case is whether the defendants' motion was properly decided under Rule 12(b)(6) or as one for summary judgment. Plaintiffs argue that by attaching eleven affidavits to their Response, they have brought up "matters outside the pleading" and therefore the district court should have treated the 12(b)(6) motion as a summary judgment motion. The district court did

not address this issue and did not discuss the affidavits. the district court decided the legal issues as if it were a straight-forward 12(b)(6) motion. We believe the district court was correct in deciding this case pursuant to Rule 12(b)(6) because the affidavits did not present the district court with "matters outside the pleading." See Friedman v. United States, 927 F.2d 259, 261 (6th Cir. 1991) (district court took judicial notice of an unpublished Sixth Circuit opinion). The affidavits here simply reiterate what the plaintiffs already alleged in the complaint; namely, that the plaintiff in this action, time and agin, had confronted the Unions repeatedly and consistently assured the plaintiff that they were protecting the plaintiffs' rights. The affidavits only provide evidence of matters already

asserted in the complaint.

The central issue in this case is whether the six-month statute of limitations period was equitably tolled because of the Unions' fraudulent concealment. Whether a statute of limitations was equitably tolled is a question of law for a court to decide. Holmberg v. Armbrecht, 327 U.S. 392, 396-97 (1946). For tolling to be found, the plaintiffs must plead with particularity all the facts surrounding the fraudulent concealment of their claim. As we have said before, plaintiff must plead facts showing: 1) defendants' wrongful concealment of their actions, 2) failure of the plaintiff to discover the operative facts that are the basis of his cause within the limitations period, and 30 plaintiffs' due diligence until discovery of the facts. See Dayco Corp.

v. Goodyeart Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975). It is important to note that all facts must be pleaded with particularity, including plaintiffs' due diligence. Id.; see also Fed. R. Civ> P. 9(b).. The plaintiff has the burden of establishing each element of equitable tolling based on fraudulent concealment. Pinney Dock & Transp. Corp. v. Penn central Corp., 838 F.2d 1445, 1465 (6th Cir.), cert denied, 488 U.S. 880 (1988).

Whether plaintiff have met their burden to show that they exercised due diligence is judged by an objective standard. In Campbell v. Upjohn Co., 676 F.2d 1122, 1128 (6th cir. 1982) we said:

> Actions such as would decive a reasonably diligent plaintiff will toll the statute; but those plaintiff who delay unreasonably in investigating

> circumstances that should put them on notice will be foreclosed from filing, once the statute has run.

Further, "Any fact that should excite [the plaintiffs'] suspicion is the same as actual knowledge of his claim." Dayco, 523 F.2d at 294 (citing Wood v. Carpenter, 101 U.S. 135 (1879)).

In their complaint, plaintiffs claim that the Unions breached their duty of fair representation. Plaintiffs base their claim on the fact that the Unions: failed to file or pursue grievenances; failed to file a legal suit; acted in collusion with Morrel to plaintiffs' detriment by negotiating side agreements which injured plaintiffs; acted arbitrarily and in bad faith; and, acted with reckless disregard for the employees' rights.

The issue argued by the parties was whether the plaintiffs should have known about the above-mentioned facts underlying their claim at a point in time earlier than August 27, 1991, when plaintiffs claim they first realized the Unions had not timely filed a claim to protect their rights.

For purposes of our review, we must accept as true the plaintiffs' allegations that the Union lied and took actions to deceive them in order prevent their filing suit in a timely manner. However, to overcome a 12(b)(6) motion, the plaintiffs must plead facts showing that they exercised due diligence. Plaintiffs' bare allegations to this effect is not enough. Dayco, 523 F.2d at 389. We believe that a reasonably diligent plaintiff should have known about and monitored the progress of the

Cummings case, in which their former co-workers raised similar claims against the Unions, particular its settlement. Such facts should have "excited their suspicion" that the Unions had breached its duty of fair representation to them because this was the precise claim for which the Cummings plaintiffs sought compensation.

Other facts that should have excited the suspicions of the plaintiffs here include the fact that the Unions did not take their first action on the plaintiffs' behalf until 1987 when they filed a cross-claim against Morrel in the Cummings case. Also in 1987, the Unions filed an unfair labor practices charge with the National Labor Relations Board. In 1988, a jury found that the Union had breached its duty of fair representation to the Kansas workers in Aguinaga.

Plaintiffs wrongly believe that continually asking the Unions what actions they've taken, and then relying on the Unions' assurances, constitutes "due diligence." We, however, have held that relying on assurances from a union or company official is not sufficient to meet the burden of due diligence. See Campbell, 676 F.2d at 1128 (plaintiff relied on the assurances of company officials and shareholders that a payment to him was forthcoming); Jones v. General Motors corp., 939 F.2d 380, 385 (6th Cir. 1991).

We believe, therefore, that by at least June 1988, a sufficiently diligent plaintiff would have discovered the basis for a breach of the duty of fair representation claim against the Union. The plaintiffs' 1992 filing was, therefore, more than six months after the

time when a sufficiently diligent plaintiff would have discovered the Unions' misconduct.

Turning to the sanctions issue, we review a district court's decision to deny Rule 11 sanctions for abuse of discretion. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990). The test for whether an attorney should be sanctioned is whether his or her conduct was "reasonable under the circumstances." McGhee v. Sanilac County, 934 F.2d 89, 94 (6th Cir. 1991); Mann v. G. & G. Mfg., Inc., 900 F.2d 953, 958 (6th Cir.), cert. denied, 498 U.S. 959 (1990). Though the district court discussed whether Mr. Hoke's actions were those of a competent attorney, the district court stated the correct test for Rule 11 saanctions pursuant to McGhee case, and them concluded that the claim was not filed

for "an improper purpose, nor was the filing of the suit unreasonable under the circumstances." While this Court may have reached a different conclusion than did the district court after hearing the facts, we believe the district court did not abuse its discretion in denying sanctions.

For the above reasons, the decision of the district court is AFFIRMED.

FILED FEBRUARY 17, 1995

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANANIAS GUMBUS, JR. et al.,

Plaintiff-Appellant
Cross-Appellee

v. Nos. 93-5113/93-5235

UNITED FOOD and COMMERCIAL WORKERS INTERNATIONAL UNION; LOCAL UNION 242,

Defendants-Appellees
Cross-Appellants

ORDER DENYING MOTION TO REHEAR

Appellants motion to rehear is denied.